

Open Research Online

The Open University's repository of research publications and other research outputs

'No one wants the taint of an association with the crimes of Nazism': (Sometimes) in search of the meaning of Nazi Law

Journal Item

How to cite:

Lavis, Simon (2020). 'No one wants the taint of an association with the crimes of Nazism': (Sometimes) in search of the meaning of Nazi Law. *Holocaust Studies: A Journal of Culture and History*, 26(1) pp. 108–122.

For guidance on citations see [FAQs](#).

© 2018 Informa UK Limited, trading as Taylor Francis Group



<https://creativecommons.org/licenses/by-nc-nd/4.0/>

Version: Accepted Manuscript

Link(s) to article on publisher's website:

<http://dx.doi.org/doi:10.1080/17504902.2018.1518258>

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online's data [policy](#) on reuse of materials please consult the policies page.

oro.open.ac.uk

“No one wants the taint of an association with the crimes of Nazism”¹:

(Sometimes) In Search of the Meaning of Nazi Law

Nazi Law: From Nuremberg to Nuremberg, edited by John J. Michalczyk, London, Bloomsbury, 2018, xviii + 343pp, (hardback), ISBN 978-1-350-00723-9

Law and the Holocaust: U.S. Cases and Materials, by Michael J. Bazyler and Robert M. Jarvis, Durham NC, Carolina Academic Press, 2018, xxi + 789pp, (ebook), ISBN 978-1-53100-832-1

The Remnants of the Rechtsstaat: An Ethnography of Nazi Law, by Jens Meierhenrich, Oxford, OUP, 2018, viii + 437pp, (hardback), ISBN 978-0-19-881411-2

Hitler's American Model: The United States and the Making of Nazi Race Law, by James Q Whitman, Princeton NJ, Princeton University Press, 2017, 208pp (hardback), ISBN 978-0-691-17242-2

Introduction: Towards a Unified Discourse of Nazi Law

In 2011 David Fraser highlighted ‘the lacunae ... in legal scholarship’s treatment of the Nazi killing machine as a juridical phenomenon’.² This same void in the legal academy’s engagement with the Third Reich, especially the Holocaust, has been commented on elsewhere³ and may be extended to include a paucity of scholarship about Nazi law within historiography. These gaps have become increasingly well recognized in recent years in works that do engage with Nazi law. Alan Steinweis and Robert Rachlin opened the introduction to their 2013 edited collection *The Law in Nazi Germany* with the words “[t]he legal history of Nazi Germany has not attracted a great deal of attention from scholars.”⁴ We can relate the relative lack of attention paid by the legal academy to the Third Reich, and by the historical academy to Nazi law, to the “rupture thesis,”⁵ the idea that Nazi Germany represents a rupture from normal legal and historical development.

While this narrative has been largely (though not entirely) superseded in the general historiography of the Third Reich, it has remained stubbornly durable in legal history and theory.⁶ More than 15 years ago, historian Patricia Szobar highlighted how “the law under National Socialism is typically regarded as having constituted a complete break from modern legal norms and standards.”⁷ In short if Nazi law is an aberration from the normal concept of law, then it does not merit theoretical or empirical study

as law. Nazi Germany is variously a lawless state, a criminal state, a non-state. This has been exacerbated by a predominant approach to Nazi law informed by key models of Nazi Germany that emphasized its lawlessness, such as Franz Neumann's famous study. As Meierhenrich notes, "one of the most troublesome legacies of *Behemoth's* enormous success has been its contribution to the marginalization of law in the study of the Third Reich" (53).

We are now, however, witnessing a notable upsurge in English language academic writing about Nazi law, represented by the books discussed here. Whitman elucidates the influence of United States race laws on the 1935 Nuremberg Laws. Meierhenrich explores Ernst Fraenkel's dual state theory of the Nazi legal system. Michalczyk's collection provides accounts of the use of law in different areas of the Third Reich. Bazyler and Jarvis's book is slightly different, offering a set of teaching materials—a casebook for use in US law schools—which mines predominantly US case judgments for the story and legal implications of the Holocaust. Furthermore, since 2013, book-length studies covering Nazi law have been published by Steinweis and Rachlin, Herlinde Pauer-Studer and J David Velleman,⁸ Thomas Vormbaum,⁹ and Michael Stolleis¹⁰. There is more attention to Nazi law, but the extent to which these works address concerns about the legal academy's neglect for the Third Reich, the historical academy's disregard for Nazi law, and the prevalence of the rupture thesis, is open to question.

We may also both marvel and despair at the wide ranging disciplinary approaches and research specialisms of those writing about Nazi law. They include political scientists, legal scholars with a variety of specialisms, legal practitioners, legal historians, general historians, and academics from other disciplines including philosophy, psychology, ethics and medicine. The varying subjects and approaches of the texts are indicative to a degree of both the wide range of multi-disciplinary writing about the Third Reich generally, and the expansive but atomized nature of research interest in Nazism within the historical academy. What is particularly apparent from some of the studies of Nazi law is how little cross-pollination there is between methods, approaches and interpretations of legal theorists, legal historians and other historians. In the works surveyed here, Whitman's is a work of comparative legal history; Meierhenrich's is a work of legal theory and intellectual history; Michalczyk's is an interdisciplinary collection primarily comprising sub-fields

of general history and legal history; Bazylar and Jarvis, meanwhile, present a case and materials book primarily of American law.

The isolation of different disciplines in studying Nazi law is illustrated by an example drawn from Meierhenrich's fascinating book about Ernst Fraenkel's "dual state" concept of Nazi law. It is surprising for someone initially schooled in the history of Nazi Germany to see Meierhenrich refer to Fraenkel's "forgotten theory" of the dual state (13), but this is not something Meierhenrich mentions only in passing. He goes on to describe Fraenkel's model as "rarely invoked nowadays," "largely forgotten these days" (13) and "virtually unknown" (23). Historical studies of the Third Reich belie this description of the currency of the dual state, however. Steinweis and Rachlin say it "remains highly influential in our understanding of Nazi legal practice today."¹¹ Steber and Gotto assert that Fraenkel "*famously* saw rule in Nazi Germany as a duality."¹² Michael Stolleis makes reference to it in various works. Nikolaus Wachsmann devotes five pages to discussion of the dual state in his study of Hitler's prisons, asserting that "Fraenkel's work is one of the most cited works on the structure of the Third Reich, a key text used to investigate the nature of Nazi dictatorship."¹³ Meierhenrich at the same time describes Carl Schmitt's body of work as having "been studied ad nauseam" (23) whereas, while historical studies of Nazi Germany might make passing reference to the biography of Schmitt as a prominent constitutional theorist under the Nazis, they rarely engage in detail with his theories about Nazi law.

The difference here is evidence of the largely distinct disciplinary fields of study relating to Nazi law. Historians of the Third Reich, on the whole, remain very much influenced by Fraenkel's work, but have very little to say about Carl Schmitt's legal and political theory, whereas Schmitt is much more influential and studied among legal and political theorists. In some ways Fraenkel's study of the Third Reich is today viewed as a specific analysis rather than a generally applicable model, which has connections to the rupture thesis and its underpinning idea of the Third Reich as a unique aberration, according to which Nazi Germany cannot really be compared even to other authoritarian or fascist regimes. From this perspective, Fraenkel's theory is unique to the Nazi state. As Whitman points out in his compact but excellent exploration of the influence of US racist law and practice on the Nuremberg Laws, "we are accustomed to thinking of Nazism as an ultimately unparalleled

horror” (3). Notwithstanding his comments about Fraenkel’s influence in the academy, Meierhenrich does make good use of a range of theoretical and empirical scholarship, including general and legal histories of Nazi Germany, throughout his book, but evidence of largely discrete pockets of study of Nazi law is not difficult to find in the scholarship.

Addressing the neglect of the dual state model to make Fraenkel’s theory serviceable as a general model of authoritarian law for political theory is one of the key objectives of Meierhenrich’s book. It is also one of its most valuable contributions, both for theorists of authoritarian law, but also for historians because of the process the author works through to achieve this. This is because, despite the dual state’s continuing popularity among historians of the Nazi state, the historiographical application of this model is open to question. Wachsmann, for example, argues that it “has often been simplified, misunderstood and shorn of its more radical conclusions.”¹⁴ Rather than being ignored, then, in historiography of the Nazi state and legal system at least, simplified forms of Fraenkel’s thesis have been over-influential. By taking the time to unpack and reapply the model to the Third Reich, Meierhenrich reasserts a more nuanced and accurate version of the dual state for use in subsequent studies of Nazi state and law, while also attempting to advance an expanded and adapted version applicable to the authoritarian rule of law.

Furthermore, while Fraenkel has remained influential, there is little doubt that Neumann’s *Behemoth* thesis has had a more powerful impact in the historical academy and beyond, particularly on our conceptualisation of Nazi law, and this “has done a fair amount to obscure—rather than illuminate—the logic of Nazi dictatorship” (22). This can be seen in his influence on the Nuremberg Trials,¹⁵ post-war legal philosophy (37), and in subsequent scholarship where “[r]eductionist perspectives like Neumann’s continue to hold sway today” (27). Meierhenrich is arguably harsh on Neumann’s study, but others more open to the merits of *Behemoth* have also recognized that Neumann’s approach in terms of the law ultimately “serves to disqualify much of what Neumann has to say about Nazi law as potentially useful to any current or future research project at a foundational level.”¹⁶ Consequently, Meierhenrich’s explicit rejection of Neumann’s theory and his elevation in its place of a model that frame Nazi law as law, helps to continue to challenge the long dominant

characterisation of the Third Reich as lawless, one of the implications of which has been a general neglect of Nazi law in Anglo-American jurisprudence and historiography. It is therefore significant that it is central to his thesis that the “idea of ‘Nazi law’ ... is not an oxymoron but was a fact of everyday life—a claim at odds with a prominent supposition in legal philosophy” (3).

(Not) In Search of the Meaning of Nazi Law

When writing about Nazi law, phrases often used include that the regime “clothed itself with a tinsel of legal form,”¹⁷ that Nazi law only instrumentalized or weaponized the law, that it undermined, abused, manipulated, debased or perverted the rule of law, that it was a pretence or façade of legality, that the “dagger of the assassin was concealed beneath the robe of the jurist,”¹⁸ or simply that the Nazi state was in whole or in part “lawless.” This line of interpretation is largely challenged by Meierhenrich, who provides a much more nuanced account of Nazi law than one of pure instrumentalism. Variations of this language are, nevertheless, commonplace in the historiography of Nazi law and it is true to say that the Nazis dismantled legal protections, manipulated the law, and used violence as part of the justice system, to a point. It is the imposition of this as the dominant or sole interpretation of the nature of Nazi law that is problematic. Szobar has recognized that:

even in Nazi Germany, the law had a constitutive function as well as a coercive and instrumental one. Law was not simply a thing apart ... Rather, law under National Socialism was also a set of institutions, practices, and actors that participated and interacted with what Friedman has termed the ‘battery of normative ideas and habits’ of everyday life.¹⁹

The idea that Nazi law was not simply a system of terror used to repress, persecute and punish but was also important in shaping the norms of everyday life resonates well with a body of historiography that now pays great attention to both the role of consent in the Third Reich and the relevance of ideology—often reflected in the use of the concept of the *Volksgemeinschaft*—to the construction and maintenance of consent. Nazi law, too, can be effectively analysed as a system that constituted societal norms as well as one that enforced them through terror, but this is not a standard approach, and so far this important perspective has been largely ignored.

Michalczyk's edited collection of essays is largely drawn from contributors to a 2015 conference "Legally Blind: Law, Ethics and the Third Reich." The book comprises 18 chapters divided into five parts. Part 1 focuses on the Jews in the justice system; Part 2 considers medicine and eugenics; Part 3 has two chapters on the economic exploitation of the Jews; Part 4 covers religion; and Part 5 looks at aspects of the war crimes trials. Each part is prefaced with a short, descriptive introduction setting the context for those chapters. An editor's introduction provides some background and chapter summaries rather than explicit thematic coherence, and a brief editorial epilogue highlights some contemporary shadows and echoes from the Nazi period. It is a fairly uneven book in terms of coverage, method and subject-matter: some chapters have helpful bibliographies, others don't; and some are more extensively sourced than others.

The dominant discourse of the way Nazi law is used in the book is already apparent from the back cover summary referring to way the Nazis "used the law as a weapon" and "manipulated the legal system and the constitution." The introduction asserts the Nazis "*simply engineered the legal system for their own ends*" (8), "*manipulating the legal system to wreak havoc on the German community*" (1). Similar references appear in various chapters of the book. For example, in his own chapter about the People's Court Michalczyk says the Nazification process "*destroyed any semblance of law*" (88). In her chapter on the persecution of homosexuals, Murphy refers to points where "the regime shores up its dictatorial nature by *undermining positive law*" (115). In a chapter about the Nazi acquisition of art and other cultural objects Amini associates relevant Nazi laws with the assertion "[a]s with most Nazi actions, *Hitler's thugs hid behind Third Reich laws*" (172). In his chapter about the persecution of German Protestants Probst notes that relevant laws "*were merely instruments that the leaders of the Nazi regime utilized*" (201).

The focus of the research is, therefore, mainly on the use of law by the Nazis as an instrument of terror, for example in the persecution of Jews and religious and sexual minorities and the operation of the People's Court. This is not to say the book is unimportant, but rather that it does not provide a complete picture of Nazi law. Firstly, more research specifically concentrated on Nazi law is very welcome, and encourages greater academic dialogue about the nature and use of law in the Third Reich. Secondly, the Nazis did use law extensively to persecute minority and

opposition groups, and these histories should continue to be written. In addition to this, while many of the chapters are shorter than is ideal for achieving the depth of evaluation desired by a researcher, they often introduce their subjects well for students and summarize or reflect important recent trends in research. This includes a greater focus on the persecution of minority groups such as homosexuals (Chapter 8) and Jehovah's Witnesses (Chapter 15), or on forms of resistance such as in the Protestant Church (Chapter 14), or highlighting current legal and ethical issues linked to the Nazi past in respect of restitution of property (Chapter 12), torture (Chapter 9) or medicine (chapters 10 and 18).

Individual chapters also provide interesting insights. Morris' overview of natural law theory in Germany from 1900-1950 in Chapter 1 picks up on key points including the Nazi's rejection of legal positivism and embrace of a version of natural law theory (18-19). Romeiser's discussion of the application in Vichy France of legislation in parallel to the Nuremberg Laws in Chapter 4 is also valuable for exposing the extent to which antisemitic law in Vichy was home grown, sometimes harsher than the German equivalents, and did not protect native French Jews over recently naturalized Jews, contrary to popular perception. Golan's discussion of Claude Lanzmann's 2013 film *Last of the Unjust* (Chapter 5) is a thought-provoking combination of film criticism and evaluation of the guilt of its protagonist, the head of the Terezin Judenrat, Benjamin Murelstein. The author considers the Judenrat's responsibility and the collaborator status of victims, as well as the individual's responsibility to the community generally, through four theoretical frameworks. In these chapters, however, like others, the analysis is generally brief, with the reader craving more detail, insight and evaluation of the implications of the findings; there is an emphasis on narrative accounts and a sometimes sparse application of theoretical concepts.

Golan's chapter also illustrates the book's very broad definition of "Nazi law," which incorporates not only laws used to prosecute Nazis (Part 5), but also in that case the framing of Lanzmann's film as a trial of Murelstein. Other chapters say very little about Nazi law or only have a tenuous connection to it. This highlights the book's equivocal approach to what Nazi law is and how it should be understood as a system, beyond a series of discrete persecutory measures. As is typical in the historiography, therefore, while individual Nazi laws are generally described as *law*

and treated as a form of positive law, references to the destruction of law, the undermining of law, and lawlessness abound without much reflection on the systemic nature of the Nazi legal regime. This often extends to the specifically legal terminology and taxonomy used. “Theft,” for example, is particularly used in the two chapters in Part 3 about the Nazi removal of property owned by the Jews, where it is accompanied by related terms such as “plunder” and “looting.” Chapter 11 discusses the confiscation of Jewish property in the occupied General Government and Chapter 12 covers the seizure and destruction of art and cultural heritage using the law and the legal tools subsequently used to address this. In these, various different kinds of law-related scenarios are described using similar labels, whereas, with some exceptions, is not often clear on which occasions the Nazis were actually enforcing the law and when they were acting purely violently and outside of the legal framework they had constructed.

There are many possible justifications for the use of these examples of legal terminology, which criminalize state actions often supported by Nazi laws, but there is a danger that the ambiguous and unexplained use of legal terms with specific meanings does more to cloud than clarify the relevant legal history. On some levels, arguably, this is not so consequential, but if, for example, we are to follow Meierhenrich in re-applying the dual state model to Nazi law using his socio-legal/anthropological methodology (rather than an abstract, philosophical approach), accurate analysis could be very useful for understanding the operation of the normative and prerogative states. Furthermore, bigger theoretical questions about the complicity of law in the Holocaust and the rupture thesis are raised because, if all acts of Nazi confiscation are theft, then they are by definition unlawful and manifestations of lawlessness. It is consequently essential in this context to understand why they are given this label, and this is not made clear in the book.

This point relates to the lack of discussion about the systemic nature of Nazi law as a whole in a book ostensibly about Nazi law. The body of empirical-historical evidence about Nazi laws is not generally put in the service of a sustained, coherent picture of Nazi law, or at least not one that goes beyond mere instrumentalism. As with most of the scholarship, the areas of law focused on are generally those where the model of persecution and terror is most apparent, but this does not tell the whole legal story. Those who have attempted to examine, understand and theorize Nazi law in the past

or more recently (from whatever perspective) are either entirely excluded (Fuller, Fraser), or are included only in isolated sections (Schmitt, Neumann, Fraenkel, Radbruch), which again points to the isolation of different pockets of Nazi law research. Chapter 1 touches on the relationship of Neumann, Fraenkel and Radbruch to natural law theory and briefly compares the use of exceptionalism by Radbruch and Schmitt, but it does not engage in any detail in what these thinkers said about the nature of Nazi law. Chapter 2, by Bookbinder, does consider the development of Schmitt's thought, but is more personal to Schmitt and so is quite brief on what he meant for the Nazi legal vision more generally. His conclusion about Schmitt's influence on Nazi law is that it "helped the Nazis to create a lawless state with categories of people who had no rights" (34), which requires further unpacking.

There is also a lack of reckoning with the complicity of law in the Third Reich, which stands out particularly strongly because of the way certain chapters promote a reckoning with the complicity of medicine. Dan Stone convincingly argues that "in order to think through Nazism, we must recognize an inevitable complicity with it,"²⁰ and overcoming the rupture thesis in respect of Nazi law is largely about recognizing and working through continuity and complicity with the Third Reich. In Chapter 18 on the reception of the Nuremberg Code in the US, Johnson challenges a previously dominant narrative about the difference between Nazi medicine and US medicine (or "civilized" medicine), and shows how it was not that it was *Nazi* medicine that caused the medical horrors of the regime, but medicine itself could be complicit with Nazism because of "the accepted social and legal norms of the time" (254). While Johnson's chapter highlights some of the connections between Nazi law and medicine, this journey is not explicitly revealed for law and legal professionals. Fernandes (Chapter 10) focuses on bioethics, arguing that the Holocaust involves "the corruption of *moral philosophy first*, and medicine and law second" (139), and also makes connections between law and medicine. Again, however, the main focus is on medicine, and so the implications that arise for law in being equally susceptible to changes in moral philosophy are not fully explored.

The most likely chapter to advance this for the law is Chapter 9, in which Annas and Crosby explore the involvement of lawyers and physicians in torture under the Bush government in the war on terror. What is missing here is not law per se but the Nazi legal history, as the historical discussion is not about the Third Reich but the lineage

of the law against torture from the Nuremberg trials onwards, and the apparent ignorance of the Bush administration's lawyers to those developments. So while there is some very interesting material on doctors and lawyers overcoming their professional, ethical inhibitions to collaborate in torture and the idea of being socialized to atrocity, what is missing is a discussion of the antecedent connection between Nazi law and the Nuremberg trials that highlights the legal continuities between the past and the present.²¹

As well as emphasizing instrumentalization and concentrating on the areas where law was used for persecution, terror and repression, *Nazi Law* also tends to return to the aspects of the relationship between law and the Holocaust typically addressed in the scholarship. These include law in the post-war period, dealing with the fallout from the regime, which incorporates war crimes trials in particular, but also ongoing property restitution cases. Complicity, to the extent it is discussed in the legal sphere, is often about the continuing professional life of legal officials in post-war Germany, in spite of their Nazi pasts. The attention to war crimes trials, for example, is evident in a spate of works specifically about different examples that have appeared since the turn of the millennium.²² This subject matter is clearly important, especially to the extent that the scholarship both calls attention to other trials beyond the famous Nuremberg IMT and reveals how the various trials have impacted on the historical and legal memory of the Third Reich. It is nonetheless peculiar how much of "law and the Holocaust" scholarship is not devoted to Nazi law.

Law and the Holocaust is the impressive output of an evidently herculean effort. While there are some previous examinations of US court cases relating to Nazi Germany, including Bazylar's own 2000 article,²³ it is not a particularly well developed field of study considering the vast amount of post-Holocaust litigation in American courts. So the achievement of selecting the cases and extracts, compiling them into a coherent whole, and adding editorial comments, all with a mind to appropriate pedagogy for supporting the teaching of a thematic law school course—not to mention producing an extensive accompanying teaching manual of over 100 pages—must be applauded. It would, however, be a course on law and the Holocaust that says relatively little about the law used to perpetrate the *Shoah*.

The stated aim of the book is to “aid students in becoming more sensitive and thoughtful lawyers” (xxi), and there is little doubt that this would be achieved because of the nature of the subject matter. It is also true that post-Holocaust litigation has raised doctrinal and professional ethical issues for American law, and many of these are well brought to light in the book. It opens with a long introductory section, in which a brief overview is followed by a section on Nazi history, which employs extracts from three case judgments (an IMT case, NMT case and an extradition case for an Auschwitz guard) innovatively to provide students with the necessary historical background and highlight key aspects of the Third Reich. This is supplemented by shorter extracts from other sources and editorial notes that fill in factual details, provide additional information and further reading, and sometimes highlight further legal and related issues, an editorial pattern adopted throughout the remainder of the book.

The introduction is followed by three additional sections. Part II covers war crimes trials against the perpetrators; Part III covers cases about restitution for the victims; and Part IV, titled “Other vestiges,” incorporates a range of other Nazi-related litigation, including for example first amendment cases around people expressing religious or other views related to their direct or secondary experience with the Holocaust and Holocaust denial and hate speech. However, the implication of the general focus on law *arising from* the Holocaust and the lack of law *contributing to* the Holocaust is that law was what happened in response to the Nazi regime, but not under the Nazi regime itself, reinforcing the opposition of (non-)law *before* Auschwitz and law *after* Auschwitz²⁴ that permeates the scholarship.

The relative absence of reflection on Nazi law in the book is exemplified in Part I, where a short extract from Hilary Earl’s 2017 article about the Nuremberg SS-*Einsatzgruppen* Trial²⁵ (39-40) is used in advance of a section of the judgment itself to highlight the focus of the *Einsatzgruppen* trial on the Holocaust. The extract refers to the influential narrative of Nazi genocide that the case constructed,²⁶ but the operation and documenting of the Holocaust in the trial is the focus for Bazyler and Jarvis, so while Earl’s book-length study of the *Einsatzgruppen* Trial is referenced in the editorial comments,²⁷ the significant part of Earl’s article that interrogates and problematizes the legacy of the legal and historical understanding constructed by the trial is entirely overlooked in the treatment it receives. Earl’s conclusion that the

“legal and procedural norms that governed the Einsatzgruppen trial may have distorted our historical understanding of certain elements of the Final Solution”²⁸ is by-passed.

The subsequent introductory section, headed “Germany’s Judges” focuses more directly on the Nazi legal system, using an extract from the Nuremberg *Justice* case to explicate the workings of the judiciary. As with the previous example, the extract demonstrates the NMT court’s framing of Nazi law, but while concerns about the problematic legacy of the construction of Nazi law have been analysed elsewhere, they are not raised in the book.²⁹ In fairness, this is not always the case, and when Nazi eugenics are discussed, the general and specifically legal role of eugenics in the US is highlighted, including a further reading reference to Whitman’s book (93). There is also, for example, an interesting discussion about the role of professional lawyers in Nazi Germany associated with cases about Holocaust classroom exercises in schools (531-534), which highlights some of complexities inherent in acting as a lawyer in a regime of unjust laws, as well as the ease with which a group can become normalized into an authoritarian mind set.

On the whole, however, the focus of the book is on technical questions for American law raised by post-Holocaust cases before US courts, and ethical issues, when they are raised, are generally narrower, professional issues associated with practising the law in the US. The editorial comments that encase the various extracts are surprisingly brief (perhaps necessitated by the overall length of the book) and descriptive. While applauding the desire to let the extracts speak for themselves as much as possible, perhaps the overall balance of the book is too much towards long extracts and away from editorial commentary. This is somewhat mitigated by the inclusion of the accompanying teaching materials, which include sample course materials and exam questions and sometimes suggest particular points to pick up on with the students, but again the focus is on similar issues. This is not, of itself, a criticism of the editorial choices made, because it reflects the focus of the book as a resource for US law students; as such it is a huge accomplishment and would form the basis of an excellent course. What is largely absent, however, which would be beneficial for legal training, is broader moral and jurisprudential reflection on the nature of law in the Third Reich, how it relates to other legal regimes, and the role of legal cases in constructing problematic narratives about both law and history.

Theorizing the Nazi Legal System

In terms of addressing legal continuities across time and space, the complicity of law in the Third Reich, and reflecting on the systemic nature of Nazi law, Whitman's comparative legal history has most in common with Meierhenrich's book, and both works represent important developments in Nazi law scholarship. Something that unites them is an effort to challenge dominant narratives about Nazi law. In Meierhenrich's case it is the representation of Nazi law as non-law, and the neglect of Fraenkel within legal and political theory that prevents his dual state theory from being applied more widely. In Whitman's case, he is contesting a consensus view on the specific question of the influence of the US on Nazi race law, which is that Nazis only made reference to US race laws "in order to claim a specious parallel to their racist programs in the face of international condemnation" (4).

Whitman's is an explicitly comparative law project, which develops from his previous writings about law and the Third Reich emphasizing continuity and comparison.³⁰ The book is divided into two substantive chapters based on the structure of the Nuremberg Laws, bookended by an introduction and conclusion. The first chapter examines the Citizenship Law, and includes a section on the less discussed Flag Law. Chapter 2 looks at the Blood Protection Law. Whitman's aim is to go beyond previous narrow comparative techniques that have been applied to this area, which have tended to deny a strong connection between US and Nazi discrimination law because of literal differences between the laws. For example, that US laws were aimed at African Americans and not Jews; and the US system was one of segregation using the Jim Crow laws whereas the Nazis did not create a similarly segregated society. In each case Whitman highlights the American example, gives a brief history of the German context of the law in question, and outlines the creation of that law more specifically, with reference to the US influence.

Whitman's view is that scholars have not previously written the history of the influence of US race laws on Nazi race laws because "they have been looking in the wrong place and have been employing the wrong interpretive tools" (11). He also sees an obstacle in another manifestation of the rupture thesis, the prevailing feeling that "the notion that Nazi policy makers may have been in some way inspired by American models may seem a bit too awful to contemplate. It may also seem implausible" (2). As a comparative lawyer, Whitman's methodology is more subtle, studying the process of

translation from American to Nazi law, which for various reasons was not a case of direct borrowing: “[c]omparative law influence is not just a matter of lifting particular regulations, copying particular paragraphs, or transplanting particular institutions” (72). Through this method he establishes that the Nazis were less concerned about segregation and, as exemplified in the Nuremberg laws, more concerned about citizenship, sex and reproduction, because of their overriding aim to maintain the racial purity of the population.

The specific conclusion Whitman reaches is that while they certainly did not like everything about the US system, “Nazi lawyers regarded America ... as the innovative world leader in the creation of racist law.” Perhaps most importantly for Nazi law research and representation, Whitman is willing to draw out some of the wider implications of his findings, which help to refute the rupture thesis beyond the challenge to it presented by the act of comparison itself:

The Nazis were not simply demons who erupted out of some dark underworld to shatter what was good and just within the Western tradition, until they were put down by the force of arms and the authentic humane and progressive values of Europe were restored. There were traditions of Western government within which they worked. There *were* continuities between Nazism and what came before and after. There *were* examples and inspirations on which the Nazism drew, and American race law was prominent among them (15).

Whitman considers what his conclusions say about US legal culture and jurisprudence more broadly at the time, in terms of the attraction for the Nazis of “the allure of an open-ended, flexible, American common-law approach to the law,” of “American ‘realism’,” and of the “American willingness to innovate” in its legal system (146). This problematizes the dominant perception of the common law as providing a liberal bastion and bulwark against overweening state power in contrast to civil law, “a system in which the law is reduced to the comparatively inflexible commands of a powerful state” (147). It also emphasizes the extent to which the Nazis desired to move away from the code-based civil law to achieve “a healthy law that ‘emerged out of the *Volks*’ rather than being the product of barren legal formalism” (146). The Nazi legal vision was, in some ways, much more like the common law than the civil law and so “if there are jurisprudential lessons to be learned from the crimes of Nazism

they are not lessons in any simple way about the dangers of crass legal positivism or of civil-law attitudes” (148).

In terms of US law, Whitman highlights how the courts, while active in other areas, largely did not challenge racist legislation, reflecting the dominant political ideology at the time, and often improvised to apply the law, notwithstanding the “conceptual incoherence of their racist decisions” (152). Whitman also expands this across time, highlighting briefly the example of American criminal justice and laws to suggest that the characteristics of American legal culture he identified as attractive to the Nazis still pose problems today. This aspect of the thesis is less well developed and less satisfactory as a result, but it does begin to reveal aspects of continuity across time and the potential complicity of contemporary law with the Third Reich, which must be explored further if we are truly to come to terms with the Nazi legal past.

As with any monograph, there are other limitations to it. It is quite a short book (at only 161 pages excluding notes) and more elaboration of some of the issues raised would be welcomed. This is not to detract from its tight focus on unpacking the US influence on the Nuremberg Laws, a significant task that Whitman achieves successfully. Beyond this, while Whitman engages with some general historiography of the Third Reich well, for example employing Ian Kershaw’s concept of “working towards the Führer” to highlight aspects of Nazi law (149), there is little engagement with the growing literature on Nazi law. This is less a criticism of the sources used, but more a comment on how the relative brevity of the text can be slightly unsatisfying in terms of digging deeper into some of the issues rightly raised in relation to the subject matter.

One characteristic of Whitman’s book that mirrors some of the other Nazi law scholarship and may be related to this as well as the fact that in its overarching narratives it is more a book about US law than Nazi law, is the use of the concept of lawlessness without clear reasoning. For example, Whitman refers to “unambiguously criminal Nazi programs” (7). He also asserts the “great jurisprudential conflict at work in Nazi Germany ... was between lawfulness, as founded in the civil-law idea of legal science, and lawlessness, in favour of which a man like Freisler could invoke the American common law” (152). This may be alluding to the conflict between the two aspects of Fraenkel’s dual state, but it is

different to *Remnants of the Rechtsstaat*. Meierhenrich is working with a model of Nazi law that explicitly incorporates both a lawful (normative state) and violent (prerogative state) way of governing, which could easily lead to the reductionist opposition of lawfulness and lawlessness. However, because Meierhenrich's version of Nazi law is fully theorized and based on a socio-legal analysis, he is very careful in how he incorporates the extra-legal aspects found in the prerogative state into a wider model based on lawfulness. Even though Whitman also expressly contests some of the interpretations of Nazi law that reinforce the rupture thesis, he is a little less careful with his language in this particular respect because it is not the chief focus of his book.

None of this, it should be emphasized, is to say that lawlessness and extra-legality was entirely absent from Nazi rule, but rather highlights the dangers of conceptualizing the Nazi state entirely as a lawless and criminal state and the importance of providing a strong theoretical and empirical justification for claims of lawlessness. The attribution of lawlessness to the Third Reich is very difficult thing to avoid when writing about the subject, a fact illustrated by use of this term and related language not just in some of the books discussed here, but in other recent legal histories of the Third Reich that in many ways advance our understanding of Nazi law significantly. It is, as implied by Whitman's discussion, a natural instinct as well as something that can be supported in part by aspects of the Nazi state. This alone cannot be used to justify a denial of all complicity of law in the horrors of the Nazi state, a failure to draw comparisons and points of continuity with other legal regimes across time and space, and indeed a refusal to see Nazi "law" as anything more than the crass instrumentalization of the pre-existing legal framework.

This latest round of books about Nazi law is innovative and welcome. It represents different disciplinary engagement, approaches and methodologies. It has empirical, theoretical, comparative and pedagogical facets, and so addresses Nazi law from a number of different perspectives, emphasizing different subject matter. This is important for constructing fruitful, interdisciplinary dialogue about Nazi law, which, these works clearly illustrate, is emerging but is still far from being achieved. It is not at all that everyone should speak about Nazi law with a single voice, but that ideally everyone would be aware of what is being said in other fields of scholarship, and so

be part of and contributing to a single, unified discourse, where they draw on each other's insights into the broader subject.

Where do the books discussed here situate the current—still somewhat atomized—discourse in terms of our understanding of Nazi law? Towards the start, this article raised a number of issues: the legal academy's neglect of the Holocaust in particular; the historical academy's disregard for Nazi law as a distinct subject; and the prevalence of the rupture thesis in academic writing about Nazi law. Throughout, further issues emerged related to the rupture thesis, including the use of the language of lawlessness, criminality and instrumentalization in respect of the Third Reich, the focus on aspects of the legal regime that highlight terror and persecution while overlooking those that had a constitutive function for society, and the failure to explore the complicity of law in Nazi Germany.

These works represent an important step forward in terms of historians writing about Nazi law and, to some extent, lawyers writing about the Holocaust (or at least its antecedent legal measures) and this builds on developments reflected in other recent published research. The rupture thesis is more multifaceted in its manifestations and difficult to overcome, but aspects of this are convincingly contested in this literature. The comparison of Nazi law with US race laws and the detailed re-application of the dual state model of Nazi law and its generalisation to the authoritarian rule of law exemplify this, but some of the contributions to *Nazi Law* and the creation of a specific casebook for a Law and the Holocaust course also make some ground in this direction. Some issues remain unresolved, however, or are more apparent in either historical or legal scholarship so much of this, we may suspect, can only be achieved by moving towards a more unified academic discourse of Nazi law.

List of references

Bazyler, Michael J. "Nuremberg in America: Litigating the Holocaust in United States Courts." *University of Richmond Law Review* 34, no. 1 (2000): 1-283.

Blumenthal, David A., and Timothy L.H. McCormack. *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance*. Leiden: Martinus Nijhoff, 2008.

DeCoste, Frederick. "Hitler's Conscience, Redemptive Political Emotions, and the Politics of Fear." *Passions in Context* 3 (2012): 1-27.

Earl, Hilary. *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History*. Cambridge: Cambridge University Press, 2009.

Earl, Hilary. "Legacies of the Nuremberg SS-Einsatzgruppen Trial after 70 Years." *Loyola Los Angeles International & Comparative Law Review* 39, no. 1 (2017): 95-115.

Ehrenfreund, Norbert. *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History*. New York: Palgrave Macmillan, 2007.

Fraenkel, Ernst. *The Dual State: A Contribution to the Theory of Dictatorship*. Translated by E. A. Shils. New York: Octagon Books, 1969.

Fraser, David. "'This is Not Like Any Other Legal Question': A Brief History of Nazi Law before U.K. and U.S. Courts." *Connecticut Journal of International Law* 19 (2003): 59-125.

Fraser, David. *Law After Auschwitz: Towards a Jurisprudence of the Holocaust*. Durham NC: Carolina Academic Press, 2005.

Fraser, David. "Shadows of Law, Shadows of the Shoah: Towards a Legal History of the Nazi Killing Machine." *Oxford Journal of Legal Studies* 32, no. 2 (2011): 401-419.

Fraser, David. "Evil Law, Evil Lawyers? From the *Justice Case* to the Torture Memos." *Jurisprudence* 3, no. 2 (2012): 391-428.

Fraser, David. "(De)Constructing the Nazi State: Criminal Organizations and the Constitutional Theory of the International Military Tribunal." *Loyola of Los Angeles International and Comparative Law Review* 39 (2016-2017): 117-186.

Fuller, Lon. "Positivism and Fidelity to Law—A Reply to Professor Hart." *Harvard Law Review* 71 (1958): 630-672.

Heberer, Patricia, and Jürgen Matthäus, eds. *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*. Lincoln NE: University of Nebraska Press, 2008.

- Hébert, Valerie. *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg*. Lawrence KS: University of Kansas Press, 2010.
- Heller, Kevin Jon. *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. Oxford: Oxford University Press, 2011.
- Landsman, Stephan. *Crimes of the Holocaust: The Law Confronts Hard Cases*. Philadelphia PA: University of Pennsylvania Press, 2005.
- Lavis, Simon. "The Conundrum of Nazi Law: An Historiographical Challenge to the Anglo-American Jurisprudential Representation of the Nazi Past." PhD diss. University of Nottingham, 2015.
- Lavis, Simon. "The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the 'Rupture Thesis' in the Anglo-American Legal Academy." *International Journal for the Semiotics of Law* (2018): 1-26 <https://doi.org/10.1007/s11196-017-9538-5>
- Mettraux, Guénaél, ed. *Perspectives on the Nuremberg Trial*. Oxford: Oxford University Press, 2008.
- Neumann, Franz. *Behemoth: The Structure and Practice of National Socialism 1933-1944*, 2nd edn. London: Frank Cass & Co, 1967.
- Pauer-Studer, Herlinde, and J. David Velleman. *Konrad Morgen: The Conscience of a Nazi Judge*. Basingstoke: Palgrave Macmillan, 2015.
- Pendas, Devin O. *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law*. Cambridge: Cambridge University Press, 2006.
- Priemel, Kim, and Alexa Stiller, eds. *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*. New York: Berghahn, 2012.
- Steber, Martina, and Bernhard Gotto. "Volksgemeinschaft: Writing the Social History of the Nazi Regime." In *Visions of Community in Nazi Germany: Social Engineering and Private Lives*, edited by Martina Steber and Bernhard Gotto, 1-25. Oxford: Oxford University Press, 2014.
- Steinweis, Alan E., and Robert D. Rachlin, eds. *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*. Oxford: Berghahn, 2013.

Stolleis, Michael. *History of Social Law in Germany*. Translated by Thomas Dunlap. Berlin: Springer-Verlag, 2014.

Stoltzfus, Nathan, and Henry Friedlander, eds. *Nazi Crimes and the Law*. Cambridge: Cambridge University Press, 2008.

Stone, Dan. *Constructing the Holocaust: A Study in Historiography*. London: Vallentine Mitchell, 2003.

Szobar, Patricia. "Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933-1945." *Journal of the History of Sexuality* 11 (2002): 131-163.

US v Josef Alstoetter et al, Trials of War Criminals Before the Nuernberg Military Tribunals, Vol III, "The Justice Case." Washington: United States Government Printing Office, 1951.

Vormbaum, Thomas. *A Modern History of German Criminal Law*, edited by Michael Bohlander. Berlin Heidelberg: Springer-Verlag, 2014.

Wachsmann, Nikolaus. *Hitler's Prisons: Legal Terror in Nazi Germany*. New Haven CT: Yale University Press. 2004.

Whitman, James Q. "Of Corporatism, Fascism and the First New Deal." *American Journal of Comparative Law* 39 (1991): 748-778

Whitman, James Q. "On Nazi 'Honour' and the New European 'Dignity'." In *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, edited by Christian Joerges and Navraj Singh Ghaleigh, 243-266. Cambridge: Hart, 2003.

Wilke, Christiane. "Reconsecrating the Temple of Justice: Invocations of Civilization and Humanity in the Nuremberg Justice Case." *Canadian Journal of Law and Society* 24 (2009): 181-201.

Wittmann, Rebecca. *Beyond Justice: The Auschwitz Trial*. Cambridge MA: Harvard University Press, 2005.

Author details

Dr Simon Lavis, Lecturer in Law, Open University, simon.lavis@open.ac.uk, 2018

ORCID: [0000-0002-2716-2646](https://orcid.org/0000-0002-2716-2646)

Simon Lavis is a lecturer in law at the Open University. His research specializes in the nexus between law, history and theory in relation to the Third Reich, and his recent work focuses on the representation of Nazi law in Anglo-American legal and historical scholarship. His latest publication is ['The Distorted Jurisprudential Discourse of Nazi Law: Uncovering the 'Rupture Thesis' in the Anglo-American Legal Academy'](#) (2018) *International Journal for the Semiotics of Law*.

Notes

-
- ¹ Whitman, *Hitler's American Model*, 5.
 - ² Fraser, "Shadow of Law, Shadows of the Shoah," 404.
 - ³ See Lavis, "The Conundrum of Nazi Law," 5-8.
 - ⁴ Steinweis and Rachlin, *The Law in Nazi Germany*, 1.
 - ⁵ Decoste, "Hitler's Conscience." See also Lavis, "The Distorted Jurisprudential Discourse."
 - ⁶ For a discussion of this see Fraser, *Law After Auschwitz*.
 - ⁷ Szobar, "Telling Sexual Stories," 133.
 - ⁸ Pauer-Studer and Velleman, "Konrad Morgen."
 - ⁹ Vormbaun, *A Modern History*.
 - ¹⁰ Stolleis, *History of Social Law*.
 - ¹¹ Steinweis and Rachlin, *The Law in Nazi Germany*, 2.
 - ¹² Steber and Gotto, "Volksgemeinschaft," 17.
 - ¹³ Wachsmann, *Hitler's Prisons*, 379.
 - ¹⁴ Ibid, 381.
 - ¹⁵ See generally Priemel and Stiller, *Reassessing the Nuremberg*.
 - ¹⁶ Fraser, "(De)Constructing the Nazi State," 176.
 - ¹⁷ Fuller, "Positivism and Fidelity to Law," 660.
 - ¹⁸ This is often quoted from *The Justice Case* (1951), 985.
 - ¹⁹ Szobar, "Telling Sexual Stories," 135.
 - ²⁰ Stone, *Constructing the Holocaust*, 241.
 - ²¹ Compare the approach with Fraser, "Evil Law, Evil Lawyers?"
 - ²² There are too many to mention here but include, as a sample: Ehrenfreund, *The Nuremberg Legacy*; Landsman, *Crimes of the Holocaust*; Mettraux, ed, *Perspectives on the Nuremberg Trial*; Heller, *The Nuremberg Military Tribunals*; Blumenthal and McCormack, *The Legacy of Nuremberg*; Hébert, *Hitler's Generals on Trial*; Wittmann, *Beyond Justice*; Pendas, *The Frankfurt Auschwitz Trial*; Earl, *The Nuremberg SS-Einsatzgruppen Trial*; Heberer and Matthäus, *Atrocities on Trial*; and Stoltzfus and Friedlander, *Nazi Crimes and the Law*.
 - ²³ Bazylar, "Nuremberg in America." See also Fraser, "'This is Not Like Any Other Legal Question'." The Fraser article perhaps brings to light some of what is absent from *Law and the Holocaust*.
 - ²⁴ See Fraser, *Law After Auschwitz*.
 - ²⁵ Earl, "Legacies of the Nuremberg SS-Einsatzgruppen Trial."
 - ²⁶ Ibid, 97.
 - ²⁷ Earl, *The Nuremberg SS-Einsatzgruppen Trial*.
 - ²⁸ Earl, "Legacies of the Nuremberg SS-Einsatzgruppen Trial," 114.
 - ²⁹ See Wilke, "Reconsecrating the Temple" and Fraser "Evil Law, Evil Lawyers?"
 - ³⁰ See Whitman, "On Nazi 'Honour' and the New European 'Dignity'" and "Of Corporatism, Fascism and the First New Deal."